

STATE OF WISCONSIN CIRCUIT COURT BRANCH V BROWN COUNTY

**VELP AUTO AND RV SALES, INC.,
PAT FOLEY, and GARY L. BOIE,**

Petitioners,

vs.

**WISCONSIN DEPARTMENT OF
COMMERCE,**

Respondent.

DECISION

Case No. 99 CV 1122

Background

This case is before me on a Petition for Judicial Review filed by the petitioners, Velp Auto and RV Sales, Inc., Pat Foley and Gary L. Boie. They ask this court to review a second Final Decision of the respondent, the Wisconsin Department of Commerce, which denied the petitioner's appeal from a decision which rejected a Petroleum Environmental Cleanup Fund (PECFA) claim in the amount of \$76,580.36.

For the reasons which follow, I find that the ALJ's decision was proper and affirm it.

Facts

The par-ties stipulated to ten pages of facts, which will not be recited here. The following are the facts as recited by the Department of Commerce in their second Final Decision:

The appellants Gary Boie and Pay [sic] Foley were the owners of a business known as Velp's Auto & RV Sales, Inc., located in Green Bay, Wisconsin. The business involved sales of used motor vehicles and vehicle rentals. In 1990, they learned that underground storage tanks located on their business premises needed to be removed and the site cleaned of any contamination which might be discovered. They eventually contracted with Creative Home Builders and Excavating for removal of the tanks, and with GCME Consultants for related environmental consultation, and the tank removal work began.

In the process of tank removal, soil contamination was discovered and Boie (as representative of the business and of the landowner) was advised of the need to clean the site. In early 1991, the site evaluation and related work began, with the excavation at the site remaining open until March 1991. The appellants then went to an area financial institution to seek a loan to cover the costs of the work on the site. They also filed a claim under the PECFA program for reimbursement of their costs. At the time of the loan closing, Boie wrote a check for \$5,000 from the business account to cover the standard deductible amount under the PECFA program and assigned the PECFA proceeds to the financial institution to cover the loan amount.

On the same date as the loan closing, Pat LeSage of Creative Home Builders and Excavating gave Boie \$5000 in cash, which Boie deposited into the business account, characterizing it as a "shareholder loan". The purpose of that payment from LeSage to Boie, from Boie's point of view, was to provide partial reimbursement for the business losses during the period of the site work, which had been longer than originally estimated. The effect of the payment was to essentially remove the requirement of the \$5000 deductible payment, so that the PECFA program paid to the appellants their entire out-of-pocket costs for the remediation. At that point in time, there were no rules which made it illegal for a consultant or contractor to reimburse a site owner for its deductible costs.

The PECFA claim paperwork was later prepared by or under the supervision of LeSage and submitted to the PECFA program by the appellants. The claim, as submitted, contained excessive claims for reimbursement, which were known to be fraudulent by LeSage, but of which the appellants had no actual knowledge. The fraudulent portion of the claim was somewhat in excess of \$20,000 (out of a total claim of approximately \$97,000). The difference related primarily to landfill costs.

Boie was later involved in a John Doe proceeding with regard to the business activities of LeSage et al. Because of his testimony on that matter, in which he denied that LeSage had reimbursed the \$5000 deductible amount, he was charged with false swearing and later entered into a plea agreement concerning that charge.

The Department of Industry, Labor and Human Relations (DILHR) initially denied the claim under Wis. Stat. §10 1. 143 (g) on March 23, 1995. It stated that:

In review of the records concerning the criminal fraud trial of Thomas Paters and Patrick LaSage and review of invoices submitted to the department in the PECFA claim it is evident that the claimants submitted fraudulent invoices in the reimbursement claim application.

Fraudulent remedial invoices in the amount of \$26,905.18 or more 'were discovered in the investigation by the Department of Justice. In addition, costs were frauded for trucking, subcontractor and "sand" backfill costs to accommodate [sic] the rebate of the \$5,000 deductible to the PECFA claimants.

The petitioners then sought review of that decision to the Department of Commerce¹ on April 21, 1995, under Wis. Stat. §101.2(6)(e) and Wis. Admin. Code §ILHR 47.53.

¹Administration of PECFA was transferred to the Department of Commerce in the interim and thus, they took over the case.

On November 17, 1998, the respondent issued a first final Decision upholding the Department of Commerce's determination that the petitioners had submitted fraudulent claims. The

petitioners then filed a Petition for Judicial Review in Brown County². However, while that action was pending, a Dane County Circuit Court Judge issued a Decision in Neuville v. Wisconsin Department of Commerce, Dane County Case No. 98-CV-1102, requiring application of a clear and convincing standard of proof with respect to any allegations of fraudulent conduct in connection with reimbursement claims under PECFA. The parties then agreed that the earlier Decision would be remanded and the ALJ would be asked to issue a new Proposed Decision in light of the Neuville case. In a Proposed Decision dated June 28, 1999, the ALJ again denied the claim. In a Final Decision dated July 26, 1999, the respondent adopted the ALJ's Findings, Conclusions and Judgment. It is from this Decision that the petitioners appeal.

Analysis

Wis. Stat. §227.52 provides for judicial review of administrative decisions. However, such a review is restricted to the record. Wis. Stat. §227.57(1). Further, in reviewing the record, the court must accord due weight to the experience of the agency involved, as well as the discretionary authority that it possesses. Wis. Stat. §227.57(10). In this case, there are two grounds for the petitioner's challenge: (1) application of the wrong standard of proof; and (2) insufficiency of evidence to sustain the Department's Decision.

Wis. Stat. §227.57(6) states that:

If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

² Brown County Case No. 98-CV-1580.

"Substantial evidence" has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Gilbert v. State Medical Examining Board, 119 Wis 2d 168 (1984).

See also Knight v. Labor and Industry Review Com'n of Dept. of Industry, 220 Wis. 2d 137 (Ct. App. 1998), Hacker v. State Dept. of Health and Social Services, 197 Wis. 2d 441 (1995).

When a court determines the agency's findings of fact are supported by substantial evidence, it is not required that the evidence be subject to no other reasonable, equally plausible interpretations. Hamilton v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 611, 617 (1980). When there are two conflicting views of the evidence, even if each is supported by substantial evidence, it is for the agency to decide which view to accept. Id at 620.

In this case, the petitioners first argue not that the agency applied the wrong standard or that it misinterpreted the standard, but that they failed to adequately consider the standard set forth by the court in Neuville. That court stated "merely because the claim documents contain errors as to the amount of reimbursement or other misstatements, such errors do not prove the existence of a fraudulent claim." Neuville, at 3. The court then required application of a clear and convincing standard of proof with respect to any allegations of fraudulent conduct in connection with reimbursement claims under PECFA. The petitioners also argue that the minimal difference in substance between the first and second Final Decisions proves that "there is no new reasoning or analysis in the second Final Decision that indicates that the Department seriously applied the heightened standard of proof to the stipulated facts of the case.

A review of the Decision establishes that the ALJ did properly apply the clear and convincing standard of proof. The clear and convincing standard is "evidence which when weighed against that opposed to it clearly has more convincing power. " WI JI-Civil §205. The ALJ began her discussions and conclusions by correctly setting forth the burden of proof to be applied. She then discussed the findings of fact in light of that standard. The ALJ concluded by holding that "[t]he stipulated facts, and the inferences which must be drawn from them, clearly and convincingly establish that the claimants acted in reckless disregard of their obligations under the PECFA program and in so doing, submitted a fraudulent claim." The Final Decision contains highly relevant evidence a reasonable mind could accept as adequate to support the conclusion that the claims submitted were fraudulent. Thus, I am satisfied the standard was correctly applied.

The petitioners argue that they were innocent pawns in this case. However, the evidence the ALJ relied on does not support that argument. The AI-J found and concluded the following:

1. The facts establish that the petitioners "clearly knew that the transaction involving the deductible needed to be concealed."
2. They mischaracterized the transfer of cash when it was deposited.
3. The transfer itself was enough to "put them on notice that the intent of Paters and or LeSage was to somehow subvert the PECFA program requirements for their own financial gain."
4. Boie later denied that the transaction had taken place which indicated his knowledge of the wrongfulness of it.
5. Boie was willing to "engage in whatever subterfuge might be called for in order to avoid paying his requisite share of the cleanup costs.
6. The claimants made no effort to monitor or assess the claim even though they monitored other claims.

The evidence showed that Boie clearly had knowledge that transactions would be hidden. It showed he contributed to the cover-up by mischaracterizing the \$5,000 deposit as being a "shareholder loan." In fact, he was prosecuted for his participation to that end. Furthermore, the second Final Decision makes it clear that, under the circumstances, there were enough facts that should have alerted the petitioners to investigate the claims or monitor the contractors, instead of ignoring the whole situation. Certainly, there are competing inferences that can be drawn from the facts. However, as set forth above, even where there is substantial evidence to support more than one view of the case set forth, the circuit court is not to interfere with the agency's decision. Hamilton, Id.

For the aforementioned reasons, the second Final Decision of the Department of Commerce is hereby **AFFIRMED**.

DATED: March 27, 2000.

BY THE COURT:

Peter J. Naze, Circuit Judge

cc: Attorney James M. Caragher